SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY BANNON** **PART** **42**

Justice

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MARK LANDA as Trustee for the Golda Landa 2011 Irrevocable Trust

Plaintiff,

- v -

ALEXANDER FRIEDMAN,

Defendant.

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INDEX NO. 657198/2021

MOTION DATE 8-4-22

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT .

In this action to recover $196,000.00 plus interest upon seven promissory notes, the plaintiff moves pursuant to CPLR 3213 for summary judgment in lieu of complaint. The defendant, who maintains that the subject funds were intended as a gift, opposes the motion. The motion is denied.

A plaintiff may seek relief under CPLR 3213 "[w]hen [the] action is based upon an instrument for the payment of money only." See HSBC Bank USA v Community Parking Inc., 108 AD3d 487 (1st Dept. 2013); Allied Irish Banks, P.L.C. v Young Men's Christian Assn. of Greenwich, 105 AD3d 516 (1st Dept. 2013); German Am. Capital Corp. v Oxley Dev. Co., LLC, 102 AD3d 408 (1st Dept. 2013). The purpose of the statute "is to provide an accelerated procedure where liability for a certain sum is clearly established by the instrument itself." G.O.V. Jewelry, Inc. v United Parcel Service, 181 AD2d at 517 (1st Dept. 1992). Under these guidelines, a promissory note may qualify as such an instrument, so long as the plaintiff submits proof of the existence of the note and of the defendant's failure to make payment. See Bonds Financial, Inc. v Kestrel Technologies, LLC, 48 AD3d 230 (1st Dept. 2008); Seaman-Andwall Corp. v Wright Machine Corp., 31 AD2d 136 (1st Dept. 1968). However, "[w]here the instrument requires something in addition to defendant's explicit promise to pay a sum of money, CPLR 3213 is unavailable." Weissman v Sinorm Deli, 88 NY2d 437, 444 (1996). A plaintiff's prima

facie proof "cannot be drawn from sources outside the agreement itself." Rhee v Meyers, 162 AD2d 397, 398 (1st Dept. 1990); see Ian Woodner Family Collection, Inc. v Abaris Brooks, LTD, 284 AD2d 163 (1st Dept. 2001). Furthermore, on a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra.

Here, the plaintiff, Mark Landa, as Trustee of the Golda Landa 2011 Irrevocable Trust, has submitted the subject promissory notes and his own sworn affidavit to support the motion. All seven notes are in the principal amount of $28,000.00 and all are in favor of the trust and signed by defendant Alexander Friedman and non-party Elizabeth Friedman, his former wife and daughter of the plaintiff, as borrowers. The notes are all dated October 31, 2013, and have maturity dates ranging from December 2015 through December 2021. Three additional notes were executed – one was canceled and the plaintiff is not seeking recovery on the others. There is no dispute that the notes were executed several months after Golda Landa, mother of plaintiff Mark Landa, and Gersh Landa, plaintiff's father, provided $269,287.00 as a down payment on a Manhattan condominium unit for defendant Alexander Friedman and his then wife, Elizabeth Friedman. Alexander and Elizabeth resided in the apartment until May 2018 when Alexander commenced a divorce action against Elizabeth. Elizabeth has continued to reside in the apartment, the ownership and possession of which was litigated in the divorce action. No amount of the notes was repaid and no payment was demanded from October 2013 until July 2020. The instant action was commenced by Mark Landa in December 2021, seeking recovery on the notes from Alexander, but not Elizabeth. These facts alone, including the notes themselves, present factual issues as to whether the funds were intended as a loan or a gift.

Even assuming that the plaintiff had met his burden in the first instance under CPLR 3213, the defendant, by his own sworn affidavit and submissions in opposition, has raised triable issues of fact in regard to whether the down payment for an apartment provided by his ex-wife's since deceased grandparents was intended as a gift and his obligation to repay any

amount. See Jurkiewicz v Zechewytz, 15 AD3d 721 (3rd Dept. 2005); Dayan v Yurkowski, 238 AD2d 541 (2nd Dept. 1997). In his affidavit, the defendant alleges that the $269,287.00 provided by Golda and Gersh Landa was intended as a gift, not a loan, and that this conclusion is supported by the circumstances surrounding execution of the notes. It was not until October 2013, several months after the closing on the apartment, when he and Elizabeth were visiting plaintiff Mark Landa's at his home in Great Neck, Long Island, that he asked them to sign the notes "in order for you guys to get the gift without tax."

The defendant further alleges that the reason the notes were made in the precise amount of $28,000.00, to be split between the signatories, $14,000.00 each, was because $14,000.00 was the limit for tax-free gifts under the 2013 Internal Revenue Code, leaving the full amount untaxed. Further, no repayment was sought between October 2013 and July 2020, after the defendant commenced the divorce action. According to the defendant, the two-page notes submitted by the plaintiff on the motion are all missing a third page which included an amortization or "note forgiveness" schedule which required no repayment at all and provided that each note would ultimately be forgiven. He further alleges that, although the notes are purportedly witnessed by an individual named Jack Rapp, he has never met, spoken with or been introduced to a Jack Rapp and no one by that name was present when the notes were signed. The defendant also observes that the notes contain no merger clause precluding the proof of the oral representations that the funds were intended as a gift. "[P]arol evidence may be offered 'to show that a writing, although purporting to be a contract, is, in fact, no contract at all'". Polygram Holding, Inc. v Cafaro, 42 AD3d 339, 340 (1st Dept. 2007) *quoting* Val-Ford Realty Corp. v J.Z.'s Toy World, 231 AD2d 434, 435 (1st Dept, 1996). Further, the defendant correctly argues that the relationship of the parties involved increases the likelihood that, notwithstanding the existence of the notes, the funds were intended as gift. See Silverman v Steinback, 41 AD2d 608 (1st Dept. 1973); see also Rosenzweig v Givens, 62 AD3d 1 (1st Dept. 2009).

The plaintiff's reply papers do not resolve the factual issues. Notably, the plaintiff does not dispute, in either of his affidavits or an affidavit of another with personal knowledge, the defendant's description of the circumstances surrounding execution of the notes at the plaintiff's home, that the purported witness, Jack Rapp, was not present, that he represented to the defendant and Elizabeth that the down payment money was a gift, that the notes were made in

the principal amount of $28,000.00 to avoid a gift tax, that they include an amortization schedule and that no payment was made or sought for nearly seven years after the notes were executed.

Thus, the plaintiff has not demonstrated entitlement to summary relief by means of CPLR 3213. Although the plaintiff may not avail himself of CPLR 3213, his claims are not extinguished as his moving papers are now deemed the complaint, and the answering papers are deemed the answer. See CPLR 3213.

The court has considered and rejected the plaintiff's remaining arguments in support of the motion, most of which were made only in a reply memorandum of law.

Any relief not expressly granted herein is denied.

Accordingly, and upon the foregoing papers and after oral argument, it is

ORDERED that the plaintiff's motion pursuant to CPLR 3213 for summary judgment in lieu of a complaint is denied, and it is further,

ORDERED that the plaintiff's moving papers and the defendant's answering papers are deemed the complaint and answer, respectively, pursuant to CPLR 3213, and it is further,

ORDERED that the parties shall commence discovery and appear for a preliminary conference on November 3, 2022, at 12:00 pm.

This constitutes the Decision and Order of the court

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

8-5-22
DATE

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
[ ] GRANTED [X] DENIED [ ] GRANTED IN PART [ ] OTHER